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Supreme Court of the United States.

OCTOBER TERM, 1902

Office Supreme Court U. S.
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JAMES H. McKENNEY,
Clerk.

No. 574.

WILLIAM K. TUBMAN, PLAINTIFF IN ERROR,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY, THE BALTIMORE AND POTOMAC RAILROAD COMPANY, THE PENNSYLVANIA RAILROAD COMPANY, ET AL.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

MOTION TO DISMISS WRIT OF ERROR OR AFFIRM JUDGMENT.

GEORGE E. HAMILTON,
Attorney for B. & O. R. R. Co.
FREDERIC D. McKENNEY,
Attorney for Penna. and B. & P. Railroad Companies.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 6678

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Now come the defendants in error, by their attorneys of record, and move this honorable court to dismiss the writ of error in the above-entitled cause for want of jurisdiction, or if upon inspection of the record this court should be of opinion that it has jurisdiction to entertain the writ, then to affirm the judgment of the Court of Appeals entered in said cause, for the reason that the question involved is so frivolous as not to need further argument, and was so clearly decided

rightly by the Court of Appeals as to make it manifest that the writ was taken for delay only.

As basis for such motion defendants in error respectfully show that the declaration in this cause was filed in the supreme court of the District of Columbia March 26, 1895, and the defendants were duly summoned by the marshal.

Demurrers to the declaration were filed June 17 and 18, 1895, respectively (R., pp. 6, 7), and no further action appears to have been taken in the cause until August 6, 1901, a lapse of more than six (6) years, when upon motion of defendants, made in open court, the cause was dismissed for failure to prosecute (R., p. 8).

Common Law Rule 28 of the Rules of Practice of the Supreme Court of the District of Columbia is as follows:

"SEC. 2. It shall not be necessary to file a joinder in demurrer, but the filing of the demurrer shall be considered as making an issue of law."

Rule 38 is as follows:

"Demurrers may be heard, on any motion day, after five days' notice, exclusive of Sundays."

From the judgment dismissing the case for want of prosecution no appeal has ever been taken, and it became absolute upon the expiration of the term at which it was entered, viz., by or before the first Tuesday of October next following.

May 19, 1902, after the October and January terms of court (two terms) had intervened and expired, counsel for the plaintiff Tubman moved the supreme court of the District to set aside and vacate its judgment of August 6, 1901, on the ground that said order had been unlawfully and im-

providently issued (R., pp. 8, 9); and on June 24, 1902, after hearing and consideration of said motion, it was overruled (R., p. 15).

From this order overruling the motion to vacate a judgment entered at a prior term of the court an appeal was prayed to the Court of Appeals, and upon consideration there same was dismissed with costs (R., p. 20). To review this decree of dismissal a writ of error was sued out from this court.

The order of the supreme court of the District of Columbia of June 24, 1902, refusing to vacate the judgment of August 6, 1901, dismissing the cause for want of prosecution, was not an appealable order, and the Court of Appeals was clearly right in dismissing the appeal. As no final judgment or decree or appealable order of the supreme court of the District of Columbia was before the Court of Appeals for review, it is clear that none such is before this court for its action, and the writ of error should be dismissed for want of jurisdiction to sustain the same.

GEORGE E. HAMILTON,
For Defendant B. & O. R. R. Co.
FREDERIC D. MCKENNEY,
For Defendants Penna. and B. & P. R. R. Co. et al.

To WILLIAM A. MELOY, Esq.,
Attorney for William K. Tubman,
Plaintiff in Error:

Please take notice that the foregoing motion will be submitted to the Supreme Court of the United States on Mon-

day, May 4, 1903, at 12 o'clock noon, or as soon thereafter as counsel may be heard.

GEO. E. HAMILTON,
For B. & O. R. R. Co.
FREDERIC D. MCKENNEY,
For Penna. and B. & P. R. R. Cos.

BRIEF.

The action was commenced in March, 1895, and in June of that year demurrers to the declaration were filed. Five years passed without any attempt having been made by plaintiff to have the demurrers disposed of or the case brought to trial.

The dismissal of the suit for failure to prosecute was proper, and the judgment of dismissal, not having been appealed from, became final and beyond the control of the court upon the expiration of the term at which it was entered.

The motion to vacate such judgment, made at a subsequent term of the court, was directed to the so-called discretionary powers of the court.

No showing of fraud or surprise in procuring the judgment of dismissal was made.

From the refusal to grant the motion to vacate no appeal lay to the Court of Appeals or elsewhere.

As was well said by the Court of Appeals, speaking through Alvey, Chief Justice:

"The refusal of the court to strike out and vacate the order of dismissal is not the subject of an appeal, any more than the refusal to grant a new trial is the subject of an ap-

peal. If an appeal could be taken and maintained upon the mere refusal to strike out a judgment nine months after its entry, there could be no reason why an appeal should not be maintained from the refusal of a motion to strike out a judgment made five years after the judgment entered; and thus there would be no finality in judgments, and no limit to the right of appeal" (R., p. 20).

Rule 10, section 1, of the Rules of Practice of the Court of Appeals of the District of Columbia is as follows:

"No order, judgment, or decree of the supreme court of the District of Columbia, or of any justice thereof, shall be reviewed by the Court of Appeals, unless the appeal shall be taken within twenty days after the order, judgment, or decree complained of shall have been made or pronounced."

No appeal from the judgment of August 6, 1901, having been taken within twenty days thereafter, it is plain that such an appeal could not lawfully be taken thereafter.

That the order of August 6, 1901, is not an appealable order is settled by authority.

In Babbington *vs.* Washington Brewery Co., 13 Apps., D. C., 527, which involved an appeal by intervenors from an order overruling a motion to vacate or rescind a final order of distribution, the court, by Alvey, Chief Justice, said (p. 532):

"But, all other considerations aside, the appeal has not been properly brought into this court. The appeal, as we have seen, was specifically taken from the order of the court of the 18th of March, 1898, overruling the motion to rescind or vacate the final order of distribution of the 15th of March, 1898. This order of the 15th of March was the effective and final decree, and the order overruling the motion to rescind it is strictly analogous to the refusal to grant a new trial in an action at law, or to the refusal to grant a rehearing in a case in equity; in neither of which cases

will an appeal lie. It was certainly competent for the court to rescind the order at any time during the term in which it was made, but it does not appear that there was anything before the court to call into exercise its discretionary power to revoke or to rescind the order. The appeal could have been taken, and should have been taken, if desired, from the order of the 15th of March. The cases referred to by the counsel for the appellants show that the appeal must be taken from the final order or decree, and not from an order overruling a motion to vacate the decree. Brockett *vs.* Brockett, 2 How. 238, 240; Memphis *vs.* Brown, 94 U. S. 715. If the appeal had been taken and brought up from the order of distribution of the 15th of March, 1898, instead of the order of the 18th of March, overruling the motion to rescind, we should, for the reasons we have stated, have affirmed that order of distribution. But the appeal, coming as it does, we have to dismiss it.

"*Appeal dismissed.*"

In Harmon *vs.* Lawler, 32 Texas, 590, it was held that a refusal to reinstate a cause that had been dismissed at a prior term for want of prosecution embodied no error, and it is well settled that an appeal will not lie from an order refusing a new trial.

Mulhall *vs.* Keenan, 18 Wallace, 380.

Fishburn *vs.* Railway Co., 137 U. S., 60.

The writ of error should be dismissed or the judgment of the Court of Appeals should be affirmed.

GEORGE E. HAMILTON,
Attorney for B. & O. R. R. Co.
FREDERIC D. MCKENNEY,
Attorney for Penna. R. R. Co. et al.